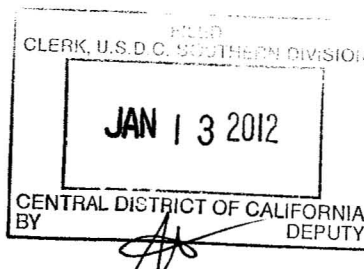


HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY
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DATED: 1/13/12
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DEPUTY CLERK



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT EARL HURST III, Petitioner, vs. LELAND McEWEN, Warden, Respondent.	}	Case No. EDCV 11-00594-DMG (RNB) ORDER DENYING PETITIONER'S APPLICATION FOR APPOINTMENT OF COUNSEL, AND ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE
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On September 26, 2011, the assigned Magistrate Judge issued a Report and Recommendation herein. The Magistrate Judge recommended that habeas relief be denied with respect to the three grounds for relief alleged in the Petition, and also that petitioner's request for an evidentiary hearing be denied. Following extensions of time, petitioner filed objections to the Report and Recommendation on December 21, 2011. Concurrently, petitioner filed an Application for Appointment of Counsel. According to petitioner, he needs counsel in order to "locate potential witnesses (who have testimony crucial to both [his] innocence and the issues contained on habeas corpus)." Petitioner maintains that, if provided counsel, he can make a showing that he is "actually innocent."

To the extent that petitioner is requesting counsel for the purpose of further developing the record with respect to the three grounds for relief alleged in the

1 Petition, the Court notes that consideration of petitioner's claims is governed by the
2 AEDPA standard of review set forth in 28 U.S.C. § 2254(d)(1) and that, as the
3 Supreme Court recently held in Cullen v. Pinholster, - U.S. -, 131 S. Ct. 1388, 1398,
4 179 L. Ed. 2d 557 (2011), review of state court decisions under § 2254(d)(1) "is
5 limited to the record that was before the state court that adjudicated the claim on the
6 merits."

7 To the extent that petitioner is requesting counsel for the purpose of locating
8 witnesses to prove that he is "actually innocent," the Court notes that, under Herrera
9 v. Collins, 506 U.S. 390, 400-01, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993), the
10 existence merely of "new evidence" relevant to the guilt of a state prisoner is not a
11 ground for federal habeas corpus relief. A claim of actual innocence is not itself a
12 cognizable constitutional claim. See id. at 404. Rather, like the "actual innocence"
13 claim of the petitioner in Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d
14 808 (1995), a federal habeas petitioner's "actual innocence" claim merely constitutes
15 a possible gateway for the consideration of the petitioner's other substantive
16 constitutional claims, to the extent that those claims might otherwise be procedurally
17 barred (e.g., by the one-year limitation provision or the procedural default doctrine).
18 See Herrera, 506 U.S. at 416-18; see also Coley v. Gonzales, 55 F.3d 1385, 1387 (9th
19 Cir. 1995). Here, the Magistrate Judge has not found that any of petitioner's
20 substantive federal constitutional claims is procedurally barred.

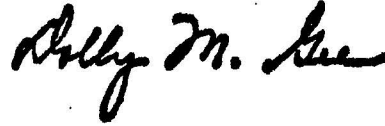
21 For the foregoing reasons, petitioner's application for the appointment of
22 counsel is denied.

23 Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all the
24 records and files herein, and the Report and Recommendation of the United States
25 Magistrate Judge. Having made a de novo determination of those portions of the
26 Report and Recommendation to which objections have been made, the Court accepts
27 the findings and recommendations of the Magistrate Judge.

28 //

1 IT THEREFORE IS ORDERED that petitioner's request for an evidentiary
2 hearing is denied; and that Judgment be entered denying the Petition and dismissing
3 this action with prejudice.

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5 DATED: 1/12/12



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8 DOLLY M. GEE
UNITED STATES DISTRICT JUDGE
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